

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

)
Rulemaking to Promulgate Regulations)
Governing an Expedited Dispute Resolution)
Process for Complaints Involving) D.T.E. 00-39
Competing Telecommunications Carriers)
as 220 C.M.R. secs. 15.00 et seq.)

POST-HEARING REPLY COMMENTS OF
NEW ENGLAND CABLE TELEVISION ASSOCIATION, INC.

INTRODUCTION AND SUMMARY

The New England Cable Television Association, Inc. ("NECTA") submits the following reply comments in accordance with schedule established in the June 5, 2000 Order Instituting Rulemaking (the "Order") in this docket. These reply comments set forth NECTA's views on the proposed 220 C.M.R. 15.00 *et seq.* rules (the "Proposed Rules"). The Proposed Rules seek to establish an accelerated docket process for resolving local telephone competition disputes. NECTA's reply comments address the positions of other interested parties as advanced in Initial Comments and at the hearing held on July 7, 2000.

As discussed in our Initial Comments and as amplified at the hearing, NECTA strongly supports the Department's efforts in this rulemaking to devise an expedited dispute resolution process for time-sensitive disputes between telecommunications carriers. We

agree with the Department's conclusion in Bell Atlantic Tariffs Nos. 14 and 17, D.T.E. 98-57 (2000), pp. 161-62, that the formal complaint processes currently in place are too cumbersome and slow to address many local competition disputes. Order, p. 1. We applaud the Department for seeking to develop an option, through this rulemaking, that would facilitate prompt resolution of appropriate disputes. NECTA notes that all of the commenters except for Bell Atlantic have supported the Department's decision to adopt an accelerated docket for local phone disputes. We urge the Department to stick as closely as possible to its current, well-conceived, proposal. Nevertheless, a few improvements and clarifications are warranted.

NECTA recommends that Department make the following changes or rulings:

-- delete the unworkable and potentially anti-competitive 15.04(3) threshold requirement that *the parties* to a dispute demonstrate good faith attempts to resolve their differences for a "a minimum period of ten days prior to petitioning the Department" and, instead, require only that *the complainant* demonstrate that it attempted in good faith to resolve the dispute before petitioning the Department, without a specific minimum time period;

- -make clear in its final order or the final rules that parties have the right to ask the Department for equitable relief where irreparable harm is threatened;
- -make clear in its order or the final rules that disputes subject to the Accelerated Docket procedures have no precedential impact except with respect to the parties involved in future disputes raising the same issue, in order to avoid the need for other parties to intervene to protect their interests (which, if allowed, could prevent time-sensitive disputes from being resolved in an expedited manner);
- -make clear that parties will not be foreclosed from bypassing dispute procedures specified in interconnection agreements to use the accelerated docket procedures in appropriate cases.
- -modify the important 15.04(4) rule that it can remove any case from the accelerated docket to afford some minimal procedural protections, such as (1) written notice that a tentative decision has been made to remove the matter accompanied by a summary of the grounds for the removal; and (2) a short period (*e.g.*, three days following receipt) for parties to comment on the tentative decision prior to a final ruling; and
- -scrutinize the proposals for shortening the time periods for action under the Proposed Rules and adopt any changes that expedite the proceedings but do not interfere with the Department's ability to review and decide these important cases (NECTA generally supports these proposals but will not advocate here for any particular set of changes.)

Conversely, NECTA urges the Department to reject some of the changes suggested by other parties, including several offered by the incumbent local exchange carrier ("ILEC"), Bell Atlantic. NECTA recommends that the Department do (or not do) the following:

-- reject Bell Atlantic's suggestion that no case be accepted onto the Accelerated Docket without agreement of both parties involved, a requirement that would place a veto in the ILEC's hands that would be used to frustrate prompt resolution of time-sensitive disputes contrary to the intent of the proposed rules.

- -reject Bell Atlantic's suggestion to adopt the substantially longer time periods that apply to Accelerated Docket matters under FCC rules, in that there is no showing that the circumstances underlying federal and state disputes requiring accelerated treatment necessarily will require identical time frames.
- -not accept the suggestions in Initial Comments of Mr. David Kanter and the Hearing Testimony of Ms. Katherine Salisbury (sp?) of Southeastern Massachusetts Regional Services to bring cable television and pole attachment-related matters within the rules, insofar as such broad expansions would interfere with the Rules' critical focus on resolving time-sensitive local phone disputes and would conflict with already-applicable dispute resolution measures in these areas.

PROCEDURAL HISTORY

The Department opened the instant rulemaking by means of the June 5, 2000 Order. Initial Comments were filed by the Attorney General, AT&T, Bell Atlantic, David Kanter, MediaOne, MGC/RCN/Vitts Joint Comments, Rhythmns Links/Covad Joint Comments, and RNK. Statements were offered at the July 7, 2000 hearing by AT&T, Mr. Kanter, NECTA, Rhythmns Links/Covad and Ms. Salisbury. Pursuant to the procedural schedule, NECTA hereby files its written reply comments.

REPLY COMMENTS

- THE PROPOSED RULES ESTABLISHING AN ACCELERATED DOCKET PROCESS FOR TIME-SENSITIVE LOCAL PHONE DISPUTES ENJOY VIRTUALLY UNANIMOUS SUPPORT FROM COMMENTING PARTIES AND SHOULD BE PUT IN PLACE WITH FEW CHANGES.

The Department established the Proposed Rules following its finding in Bell Atlantic Tariffs Nos. 14 and 17, D.T.E. 98-57, at 161-62, that the formal complaint procedures currently in place were too cumbersome to resolve many local competition disputes and that the delays inherent in the process benefitted the incumbent provider, Bell Atlantic. Order, p. 1. The Department also stated that it "seeks to facilitate increased competition for telecommunications services by offering an option for prompt resolutions of disputes between carriers. *Id.*

These findings have been strongly supported by virtually all of the commenters. The Attorney General, the various CLECs and NECTA all support the Proposed Rules enthusiastically and propose certain refinements to make them more effective. Mr. Kanter offers some language changes and clarifications but makes no statement in opposition to the Proposed Rules. Bell Atlantic states that it does not object to the Proposed Rules "in principle," but proposes several changes (discussed below) that would render them ineffective for the intended purposes.

The Department should take note of the strong support for the Proposed Rules and promptly adopt a set of rules establishing an accelerated docket process with relatively few changes from its well-conceived and thoughtful draft.

- **NECTA SUPPORTS SEVERAL CHANGES TO MAKE THE PROPOSED RULES MORE EFFECTIVE.**
 - **The Department Should Eliminate the 10-Day Minimum Pre-Filing Negotiation Period and Place the Burden of Showing Good Faith Settlement Efforts Exclusively on the Complainant.**

NECTA strongly recommends that the Department modify the section 15.04(3) threshold requirement that "the parties to the dispute must demonstrate that they attempted to resolve their dispute between themselves for a minimum period of ten days prior to petitioning the Department." As written, this requirement likely will be unworkable in practice and is potentially subject to abuse for several reasons.

First, the requirement that the *parties* must prove good faith efforts to resolve the dispute as a threshold requirement places too much power in the hands of the potential malefactor. The language should be changed to require that the *complainant* prove good faith efforts to resolve the case short of litigation. Second and similarly, under the current language a malefactor could frustrate an injured party's pursuit of expedited treatment by refusing to return calls or claiming unavailability to begin talks and, thereby, delay the filing of a complaint for days or

even weeks before the mandatory 10 day minimum clock even begins to run. Finally, in cases where a dispute is obviously intractable or time is truly of the essence, the minimum 10 day period would serve no legitimate purpose other than to delay the presentation of the case to the regulators.

NECTA's concerns about this clause in section 15.04(3) were echoed in the written comments of several parties, including AT&T (at Section C), the MGC Joint Commenters (at Section II), MediaOne (at page 2), Mr. Kanter (at Section 1(g)), and RNK (at Section II). All are concerned that this language will inadvertently provide the incumbent with the ability to delay or frustrate entirely application of the rules.

To address all of these concerns, NECTA recommends that the minimum 10 day period be deleted and that section 15.04(3) be changed to read as follows: "In order to be eligible to file for expedited review, the complainant must demonstrate that it attempted in good faith to resolve the dispute prior to petitioning the Department." This will shift control over the initiation of an accelerated proceeding out of the hands of the incumbent and, moreover, will delete the arbitrary 10 minimum period that will not be necessary or desirable for many disputes. It shifts the obligation to pursue settlement in good faith into the hands of the complainant, where it belongs and where it reinforces the natural inclination for a CLEC facing potential competitive injury or harm to attempt to resolve the matter before pursuing litigation. NECTA notes that a complainant that does not pursue settlement with appropriate vigor risks losing the right to accelerated treatment under the Department's balancing test, including the section 15.04(2)(a) requirement that the parties have "exhausted the reasonable opportunities for settlement."

- The Department Should Make Clear That Complainants Can Seek Equitable Relief in Appropriate Cases.

As a second point that is somewhat related to the preceding argument, NECTA notes that the Proposed Rules do not expressly provide for complainants to be able to seek equitable relief, including temporary restraining orders, in cases where they are at risk of irreparable harm in the period leading up to Department review. To the contrary, the minimum 10-day pre-filing negotiation period in section 15.04(3) (discussed above) would preclude such relief in most cases. In addition to deleting the 10-day minimum period in section 15.04(3), the Department should make clear in its final order that parties have the right to petition the Department for immediate injunctive relief in the few cases where Department action is necessary to prevent irreparable harm. AT&T expressed similar concerns in its Initial Comments (at Section D) and at the Hearing. An express reference in the final order is needed to prevent incumbents from arguing that the failure to include an equity section in the Proposed Rules reflects an intent that such relief is not available. The Department need not specify the procedures to be followed in the event a party seeks such relief. NECTA, however, would not oppose any decision by the Department to include filing, notice and prompt hearing procedures in the Proposed

Rules for cases where complainants seeking access to the Accelerated Docket also need equitable relief.

- **The Department Should Limit the Precedential Effect of Accelerated Docket Cases.**

The Initial Comments of the Attorney General and Bell Atlantic both caution the Department about the need to determine the precedential effect of matters designated for the Accelerated Docket. NECTA shares the concern that accelerated docket matters should only have very limited, if any, precedential effect. A contrary rule will incent and perhaps require all potentially affected carriers to seek intervention in an accelerated case. At a minimum, this will complicate and potentially slow down litigation of an accelerated matter. In a worst case scenario, multiple interventions caused by concern over precedential effect may create a situation where the case has to be removed from the Accelerated Docket and moved over to a standard complaint schedule. *See* Proposed Rule 15.04(c) (identifying as a factor in whether case should be on Accelerated Docket the "likelihood that persons in addition to the complainant and respondent will be substantially and specifically affected by the proceeding").

NECTA recommends that the preclusive effect of a matter on the Accelerated Docket be limited to the parties involved, such that it would have collateral estoppel effect on future disputes involving the same sorts of facts, but would have no precedential impact on disputes between either of the original parties and a third party.

- **The Department Should Allow Parties to Bypass Interconnection Procedures In Appropriate Cases.**

Bell Atlantic's comments raise the issue of the relationship between the Proposed Rules and dispute resolution procedures in existing interconnection agreements. Bell Atlantic argues that the interconnection agreement procedures should govern in all cases. NECTA does not fully agree with this position.

NECTA believes that many parties will want to follow the dispute resolution procedures in interconnection agreements prior to filing any sort of complaint with the Department as a matter of sound policy. The Department, however, should make clear in the final order or rules that it will not foreclose parties from seeking to bypass such procedures where circumstances warrant, including cases where expedited action is needed to prevent irreparable harm. The Department of course will remain free to deny accelerated docket status to those cases where parties seek resort to the Accelerated Docket, bypassing interconnection procedures, without good cause.

- **The Department Should Afford Some Process Before Removing A Complaint From the Accelerated Docket.**

Another section needing amendment is section 15.04(4), which authorizes the Department to "remove the matter from the Accelerated Docket either on its own motion or at the request of any party." This provision is undoubtedly appropriate and necessary to weed out unsuitable cases. Nevertheless, it raises concerns that the Department will act precipitously or without a full understanding of the underlying facts or the importance of expedited handling of the dispute.

In order to ensure fair treatment of a complainant that, by definition, believed that the accelerated docket was an important means of resolving a time-sensitive dispute, the Department should modify the proposed rule to incorporate basic procedural protections: (1) the staff should notify the affected parties in writing that a tentative decision has been made to remove the matter from the accelerated docket and briefly state the grounds for the removal; and (2) the parties should be given a short time (*e.g.*, three days following receipt) to comment on the tentative decision. The Department could then review the comments and promptly render a decision on the suitability of the case. This would afford at least minimal process before the Department takes an action that might harm a party's fundamental interests.

- **NECTA Urges the Department to Scrutinize and Consider Adopting Proposals for Shortening the Current Time Periods in the Proposed Rules.**

As discussed above, NECTA proposes eliminating the fixed 10-day minimum pre-filing negotiating period in Section 15.04(3). This should not only help prevent unnecessary delays or frustrations in bringing a matter to the accelerated docket, it also may help shorten by a few days the nearly three month period called for under the Proposed Rules for handling an accelerated docket matter from initiation to decision. This is no doubt far quicker than could occur in an ordinary complaint case, but it remains slower than optimal for some fast moving local competition disputes.

Some of the other parties offered different proposals for reducing this time period by reforming or changing some of the individual intervals called for under the Proposed Rules. *E.g.*, AT&T Initial Comments at Section C; Rhythm Links/Covad Initial Comments at Section II. NECTA is generally supportive of the desirability of reducing somewhat the time periods provided under the Proposed Rules and urges the Department to look at these proposals carefully. The Department should adopt those proposals that shorten the time for review without impeding the Department's ability to render a timely and sound decision. NECTA is not prepared to endorse particular proposals or elements thereof at this time.

- **Other Possible Changes**

-- As discussed in the comments of several parties, the Department should be clear whether it is referring to calendar or business days when setting time frames under the Proposed Rules.

- **-MediaOne reasonably points out that the 15.05(4) joint list of stipulations and discovery issues on which the parties have reached agreement is both premature and redundant in light of essentially the same requirement in Proposed Rule 15.07(5).**
- **-NECTA doesn't oppose the suggestion of several carriers that it would be appropriate in some cases to use an accelerated docket case to determine liability and then calculate damages in a subsequent phase of the docket.**
- **NECTA OPPOSES SOME CHANGES REQUESTED BY OTHER PARTIES.**

Most of the commenters in this docket advocate views that support or are consistent with the views espoused by NECTA in our Initial Comments and at the July 7 hearing. Nevertheless, some proposals-mostly from Bell Atlantic-are contrary to the purpose of the Rules and should not be adopted. These proposals are discussed below.

- **Bell Atlantic's Suggestion that Both Parties Must Agree to Gain Access to the Accelerated Docket Likely Will Gut the Rule.**

Bell Atlantic proposes (at Section I(A)) that "[a] carrier's participation in the Department's accelerated process should be voluntary, i.e., the process should be invoked only where both parties agree that the issues raised are suitable to being handled on this basis." NECTA strongly opposes this change. As noted in the Department's June 5 Order, the Accelerated Docket process is intended to remove disparities that presently provide a competitive advantage to the incumbent carrier. If the process is voluntary, Bell Atlantic will likely object to all or virtually all of such petitions, thereby eviscerating the rule.

Bell Atlantic's justifications for this proposed change are not convincing or on point. "Fast track" proposals in many court systems can be voluntary (as Bell Atlantic correctly points out) because there is not the concern, present in the telecommunications context, that one party (the ILEC) has a huge structural advantage due to its extreme market power that needs to be corrected. Bell Atlantic is in an "unequal position" under the Proposed Rules because it has an "unequal" and preferential position in the market. This is precisely why the counterpart federal rule on which the Proposed Rules are based does not require consent of all parties. The additional concern that a complainant will unfairly "game" the system

also is unfounded. The Department has established substantive criteria for the types of matters suitable for the Accelerated Docket, and will be in position to protect Bell Atlantic against any abuses.

- **Bell Atlantic Fails to Show Why the Department Should Use the FCC Accelerated Deadlines "At A Minimum."**

Bell Atlantic also argues that the Department should lengthen the time periods contained in the Proposed Rules to mirror the somewhat longer periods in the counterpart federal accelerated docket. Bell Atlantic makes no showing that the types of proceedings at the FCC and the Department are sufficiently identical in nature to require identical deadlines or why "consistency" is necessary or appropriate here. NECTA recommends that the Department establish the shortest schedule consistent with the time needed to produce a timely final decision and with a reasonable ability of both parties to prepare a case for hearing, and promulgate that as the final rules without regard to what the FCC ordered for cases brought before it.

- **The Department Should Not Expand the Scope of This Docket to Include Cable Operators and Pole Attachments Disputes.**

Two commenters, Mr. Kanter in his written comments and Ms. Salisbury in her hearings comments, inquired whether the Department should expand the scope of the Proposed Rules to go beyond local competition disputes. Mr. Kanter asked whether the rules should apply to cable operators and Ms. Salisbury asked whether they could be applied to the pole attachment dispute context. NECTA opposes both expansions for several reasons.

First, the Proposed Rules have a particular purpose, namely, establishing an expedited process that will help solve the specific difficulties in local phone disputes that occur where the incumbent is advantaged by delay. This specific concern does not apply in the cable operator context. The Department should not lose the focus of the rules by expanding their scope to include disputes that fall outside the core policy concerns that lead the Department to open this docket.

Second, there is no need for an accelerated docket of this type in the cable television context. Unlike the telephone context, competing cable operators do not interconnect their networks to each other. Thus, the incumbent cable operator can't extract unfair terms or cause network-related difficulties on an interconnected competitor. Moreover, any disputes between a cable operator and a municipality ordinarily are governed by processes laid out in federal law, state law and franchise agreements. It would be confusing and difficult to overlay another set of rules on top of this existing body of law.

Finally, while the need for expedited handling certainly may be a problem in the pole or conduit attachment process and may have serious local competition ramifications, the Department already has a set of rule in place governing such disputes that expressly provide for equitable relief and require that decisions occur not more than 180 days after complaint. Thus, it is not necessary to expand the scope of the Proposed Rules to encompass pole or conduit disputes.

CONCLUSION

NECTA appreciates the opportunity to present these reply comments in this useful and important docket. For the reasons discussed above and in our earlier Initial Comments and Hearing Statement, the Department should enact the Proposed Rules in substantially their present form. The Department should modify the Proposed Rules as discussed in Section II above and not accept the changes suggested in Section III.

NEW ENGLAND CABLE TELEVISION ASSOCIATION, INC.

By its attorneys,

Robert J. Munnely, Jr.

Director of Legal & Regulatory Affairs

100 Grandview Road, Suite 310

Braintree MA 02184

(781) 843-3418

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